FILED
FEB 3 2003
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No. 02-798

In the Supreme Court of the United States

FABRI-CENTERS OF AMERICA, INC., PETITIONER

v.

ELAINE L. CHAO, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under the Fair Labor Standards Act (FLSA), certain "extra compensation" is excluded from an employee's regular rate of pay for purposes of calculating overtime compensation. 29 U.S.C. 207(e)(5), (6), and (7). The question presented is:

Whether an employer who makes extra compensation payments qualifying under 29 U.S.C. 207(e)(5) and (6) may, under the crediting provision of 29 U.S.C. 207(h)(2), credit that extra compensation against FLSA overtime liabilities only for the same workweek or work period for which the extra compensation was paid.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 308 F.3d 580. The decision and order of the district court (Pet. App. 28a-40a; 45a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 2002. The petition for a writ of certiorari was filed on November 20, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Sections 7 and 15(a)(2) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 207, 215(a), require employers to pay covered employees who work more than

40 hours in any workweek overtime pay for those extra hours. Under the FLSA, the overtime rate must be not less than one-and-one-half times the employee's regular rate of pay. 29 U.S.C. 207. In general, FLSA overtime payments must be made promptly, such that "overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends." 29 C.F.R. 778.106. Section 15(a)(2) of the FLSA, 29 U.S.C. 215(a)(2), makes it unlawful for any person "to violate * * * section 207 of this title."

When calculating the employee's "regular" rate of pay for purposes of computing FLSA overtime, employers must include certain types of "bonus" pay and "shift differentials." The FLSA, however, also provides that some types of "[e]xtra compensation" paid by employers "as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section." 29 U.S.C. 207(h)(2). In other words, where employers provide certain types of extra or premium compensation, that compensation may be used to offset the overtime pay that the FLSA would otherwise require. This case concerns whether such credits should be calculated on a work-period basis, or instead under an aggregate methodology. Under the work-period method, an employer may credit premiums paid during one work period only against the FLSA overtime for that same work period. Under the aggregate method, an employer may carry premiums forward or backward, whenever paid, against any FLSA overtime that is otherwise owed.

To illustrate the difference between the work-period method (the Secretary's view) and the aggregate method (petitioner's view), assume that, pursuant to a collective bargaining agreement, an employee is paid a

regular rate of $10 per hour, plus double time for work performed on Sunday. The employee ordinarily works 40 hours per week and receives $400. If, in a given workweek, the employee works 40 hours from Monday through Friday, and then 8 hours on Sunday, the employee is entitled to $560—regular weekly pay of $400 plus $160 for Sunday (8 hours x $20/hour) under the collective bargaining agreement. The FLSA mandates that the 8 hours worked in excess of the 40-hour workweek be compensated at not less than 1-1/2 times the regular rate or $120 (8 hours x $15/hour). The $160 paid under the bargaining agreement for Sunday work is a premium payment qualifying under Section 207(e)(6). Thus, while it is excluded by that provision from the calculation of the regular rate of pay (which remains $10 per hour), it may be credited under Section 207(h) against the FLSA overtime otherwise owing. In this hypothetical, the contractual premium payment ($160) is larger than the FLSA overtime owing ($120); it thus completely extinguishes the FLSA liability, and the employee is paid under the collective bargaining agreement.

Assume, however, that in a later workweek, the employee works 50 hours and none of those hours are on Sunday. Under the collective bargaining agreement, the employee would be entitled to $500—regular weekly pay of $400 + $100 (10 hours x $10/hour). The FLSA, however, mandates $150 for the 10 overtime hours—10 hours x $15/hour. Because the employer has made no premium payment in that later workweek, under the Secretary's work-period construction, the employer receives no credit against the FLSA overtime otherwise owing. The employer must pay the full FLSA overtime for the later workweek, and the $40 premium the employer paid in week one in excess of

what the FLSA mandated—$160 minus $120—cannot be carried forward to extinguish that later liability. In contrast, under petitioner's (aggregate) method, the employer would apply the $40 credit in the later workweek (even if that workweek occurred years later). The result would be that, in the later workweek, the 10 hours of overtime work would yield only an extra $110 in compensation—$150 minus $40—not the $150 otherwise mandated by the FLSA.

2. Petitioner Fabri-Centers of America, Inc. owns and operates retail stores that sell fabrics, notions, and crafts. Pet. App. 4a, 28a-29a. It also maintains a warehouse and distribution center. *Ibid.* Pursuant to a collective bargaining agreement in effect between April 1, 1996, and May 17, 1998, petitioner paid its employees a base rate for work performed at their primary work location in the Hudson, Ohio, warehouse. *Id.* at 6a, 29a & n.1. Those employees' "regular pay" consisted of the hourly base rate multiplied by the number of hours worked. *Id.* at 6a, 29a. For work performed at any other location, however, "regular pay" was determined by the higher of two formulas. The first formula consisted of calculating the "average rate," under which petitioner took the total wages the employee earned over a six-month period (including overtime pay) and divided it by the total hours worked in that period (including overtime hours). *Id.* at 6a-7a, 29a-30a. The second formula consisted of calculating "bonus pay," which was based on the extent to which the employee met or exceeded certain production goals. Under the "bonus pay" formula, the employee was paid "the product of hours worked multiplied by base rate plus any 'bonus pay.'" *Id.* at 30a. Petitioner also paid daily contractual overtime (of one-and-one-half times the "base rate") for work performed in excess of eight hours in a

day, and for Saturday work after a 40-hour workweek. *Id.* at 30a. Petitioner paid double time for work performed on Sundays. *Id.* at 30a-31a. It is not disputed that petitioner's methodology violated the FLSA, because the hourly base rate for calculating overtime compensation did not include the average rate, bonus pay, or other shift differentials. *Id.* at 7a-8a, 30a-31a.

The Secretary of Labor brought this enforcement action under 29 U.S.C. 217 in the United States District Court for the Northern District of Ohio, to enjoin petitioner from violating Sections 7 and 15(a)(2) of the FLSA, 29 U.S.C. 207, 215(a)(2). Pet. App. 3a.[1] Petitioner did not contest that it violated the FLSA when it failed to include the average rate, bonus pay, and other shift differentials in the employees' regular rate of pay for purposes of computing FLSA overtime pay. Pet. App. 8a, 34a n.7. Petitioner, however, sought a credit under 29 U.S.C. 207(h) for the contractual premiums it paid in excess of FLSA requirements during the two years in question. Pet. App. 8a, 37a. There was no dispute that some credit was appropriate; the only dispute concerned how that credit should be calculated.

The Secretary contended that qualifying premiums paid by petitioner could be credited against FLSA overtime only for the workweek for which the premiums were paid. Petitioner, in contrast, proposed crediting the total premiums, regardless of when earned, against the total FLSA overtime owed for the entire two-year period. Pet. App. 8a, 37a. The parties stipulated that, under the Secretary's interpretation, the overtime owing was $545,262.21, and that, under peti-

[1] The Secretary also alleged violations of the FLSA's record-keeping requirements, 29 U.S.C. 211(c), 215(a)(5). Pet. App. 3a. Neither court addressed those allegations.

tioner's interpretation, the overtime owing was $431,948.58. *Id.* at 42a-43a.

The district court granted the Secretary partial summary judgment on the issue of liability, holding that petitioner violated FLSA overtime requirements. Pet. App. 33a-36a. However, the court also granted partial summary judgment to petitioner on the premium-crediting issue. Agreeing with petitioner's interpretation of Section 207(h), the court held that petitioner could credit all past premium payments for the entire two-year period against all FLSA overtime owed. It ordered petitioner to pay the amount ($431,948.58) specified in the joint stipulation consistent with its interpretation. *Id.* at 45a.

3. The court of appeals affirmed on liability, but reversed and remanded on the method of crediting premium payments. Pet. App. 25a. The court first determined that the text of the FLSA is silent or ambiguous "as to when 'extra compensation' credit may be used." *Id.* at 11a-12a. Because the statute's text did not answer the precise question before it, the court also reviewed the legislative history of the relevant provision. That legislative history, the court noted, provided evidence that Congress, when it enacted the crediting provision in 1949, was aware of the Secretary's methodology, under which credits for "contractual premiums against statutory overtime owed to employees" would be calculated "using the seven-day workweek as the standard reference point." *Id.* at 14a. The court also noted that Congress had amended the statute twice in response to a 1948 decision of this Court that had required the payment of "overtime on overtime." *Id.* at 12a-13a. The first amendment allowed an employer to apply extra compensation paid pursuant to a contract "toward *any* premium compensation due [under the

FLSA]." *Id.* at 13a. That language was "short-lived," however, as Congress more extensively revised the FLSA later in 1949. *Ibid.* The later revisions included the current language of 29 U.S.C. 207(e)(5), (6), and (7), which exclude certain premium payments from the calculation of overtime, and the current crediting language of Section 207(h)(2), which provides that employer premiums may be applied "toward overtime compensation payable pursuant to this section." Pet. App. 13a. The court of appeals was persuaded that, whatever the precise meaning of the original "toward *any* premium" language, Congress intended to change and limit that provision's meaning when it deleted the word "any" in the later amendments. *Id.* at 16a-17a. The court of appeals also rejected petitioner's argument that the juxtaposition of "extra compensation *paid*" with "overtime compensation *payable*" in 29 U.S.C. 207(h)(2) (emphases added) indicated a clear intent that all past extra compensation be creditable against all future FLSA overtime compensation. Pet. App. 15a-16a. The court concluded that "the relevant legislative history tends to favor the Secretary's position that the statute should be interpreted to include a workweek or work period restriction." *Id.* at 12a.

The court also agreed with the Secretary that "the FLSA as a whole and the [Department of Labor's] implementing regulations of the Act highlight the primacy of the workweek concept." Pet. App. 17a. The provisions of the Act establish the workweek as the benchmark for calculating overtime, and the "regulations implementing the Act support prompt payment of overtime." *Id.* at 18a. The court was persuaded that the prompt-payment regulation, 29 C.F.R. 778.106, "suggest[s] that the premiums should be credited within the same workweek in which they were paid."

Pet. App. 18a. Thus, while the court of appeals perceived "divergent case law" on the issue, *id.* at 19a, it concluded that "the case law supporting the Secretary's interpretation appears to be more persuasive." *Id.* at 20a.

Finally, the court of appeals noted that, for decades, the Department of Labor had issued Wage-Hour Opinion letters "applying a workweek or work period standard." Pet. App. 24a. Although the court indicated that it "would hold" as it had "even in the absence of such opinion letters," the court nonetheless found the expert opinions expressed in those letters "informative." *Id.* at 24a-25a.

Judge Siler dissented. Pet. App. 26a-27a. In his view, it was "unfair for the Secretary of Labor to force an employer to [credit on a workweek basis] when the statute does not so provide, no regulation has ever been promulgated on the subject, and employers in other states are allowed these premium credits" because of allegedly divergent case law. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review thus is unwarranted.

1. Petitioner contends the Sixth Circuit's decision, while in accord with a decision of the Seventh Circuit, *Howard* v. *City of Springfield*, 274 F.3d 1141 (2001), creates a conflict with decisions from the Eleventh Circuit and the Federal Circuit. Pet. 3-4, 12-16. Notwithstanding the Sixth Circuit's perception of "divergent case law," Pet. App. 19a, there is no circuit conflict on the proper method of crediting contractual premium payments. Neither court of appeals decision cited by

the Sixth Circuit or petitioner as contrary authority, *Kohlheim* v. *Glynn County*, 915 F.2d 1473 (11th Cir. 1990), and *Alexander* v. *United States*, 32 F.3d 1571, 1577 (Fed. Cir. 1994), resolves that issue. To the contrary, the only court of appeals decisions that have squarely addressed the issue are the decision below and the Seventh Circuit's decision in *Howard*, *supra*, and both reached the same conclusion—that premium crediting pursuant to Section 207(h) of the FLSA "include[s] a workweek or work period restriction." Pet. App. 17a; see *Howard*, 274 F.3d at 1148-1149.[2] The premium crediting issue presented here thus has not arisen very often, but to the extent it has arisen, circuit law is uniform.

a. Petitioner cites the Eleventh Circuit's decision in *Kohlheim* for the proposition that Section 207(h) permits employers to credit premium payments for one workweek against FLSA overtime for another. See Pet. 13-14. *Kohlheim*, however, did not involve that issue. In that case, firefighters and emergency medical technicians brought suit against their county employer for FLSA overtime pay. 915 F.2d at 1473.[3] The *Kohlheim* court first decided that, under the statute and pertinent regulations, mealtimes should have been

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[2] Petitioner also cites *Abbey* v. *City of Jackson*, 883 F. Supp. 181 (E.D. Mich. 1995), as representing a contrary line of authority. Pet. 13-14. That Michigan District Court decision, however, does not survive the Sixth Circuit's decision in this case. See Pet. App. 20a. *Abbey* thus is no longer good law within the Sixth Circuit, and is without precedential effect elsewhere.

[3] Ordinarily, the FLSA takes the seven-day workweek as the basis for calculating FLSA overtime. However, firefighters are covered by 29 U.S.C. 207(k), which allows for a longer FLSA work period for public agencies engaged in fire-protection and law-enforcement duties. See 29 C.F.R. 553.224(a).

included as hours worked for overtime purposes. *Id.* at 1476-1477. Second, the court explained the proper method for calculating the "regular rate" of compensation for FLSA overtime purposes, contrasting it with the rate the county had been using. *Id.* at 1480. Finally, the court of appeals addressed whether the district court's order had precluded proper crediting of premium pay against the county's FLSA liability. *Id.* at 1481.

The issue petitioner raises here—whether the credits were limited to the workweek for which the premium payments were made—never arose. To the contrary, because the issues were certified for interlocutory appeal, 915 F.2d at 1476, damages had not yet been calculated. See *id.* at 1481 (recognizing need for separate "damages phase"). The sole question on crediting was whether the district court's order somehow improperly limited the premium pay that could be used as a credit. Throughout the time period in question, the county had paid overtime compensation at one-and-one-half times an "artificial hourly rate" known as the "2928 rate." *Id.* at 1481 & n.39. For some two-week periods, the 2928 rate was larger than the new "regular rate" calculated by the court, and, for other periods, it was smaller than the "regular rate." *Id.* at 1481. "The county admit[ted] liability for the compensation shortfalls during the[] periods" when "the '2928 rate' was smaller than the * * * 'regular rate.'" *Ibid.* However, the county read the district court's decision as "den[ying the county] credit for overtime premiums paid during" those "work periods when the '2928 rate' fell *below* the regular rate." *Ibid.* (emphasis added). On that issue, the court agreed "that the county should be allowed to set-off *all* previously paid overtime premiums, *not just those equal to or greater than 1 1/2 times the regular rate.*" *Ibid.*

(emphasis added); see *ibid.* ("the county is entitled to set off all previously paid overtime premiums, not just those of at least 1 1/2 times the regular rate, against any overtime compensation found to be due and owing during the damages phase of the trial."). The court did not purport to resolve whether premiums should be credited on a work-period or aggregate basis. Nor did the court analyze the statute's text, structure, history, or underlying policies to resolve that issue. *Kohlheim* thus cannot be taken as resolving the matter, and there is no reason to think the Eleventh Circuit would read *Kohlheim* as binding it to any particular result on the question should the issue arise in that circuit in some future case. Cf. *Brecht* v. *Abrahamson*, 507 U.S. 619, 631 (1993) (court is "free to address the merits" where it has "never squarely addressed the issue" or has "at most assumed" an answer).

b. To the extent petitioner also claims that *Alexander* v. *United States*, 32 F.3d 1571 (Fed. Cir. 1994), conflicts with the decision below, that claim too is incorrect.[4] In *Alexander*, the Federal Circuit considered whether premium payments made by the Immigration and Naturalization Service (INS) pursuant to another federal statute apart from the FLSA—the "1931 Act"—"constitute[] 'extra compensation provided by a premium rate' under the FLSA." *Id.* at 1577. Concluding that 1931 Act pay does constitute such "extra compensation provided by a premium rate," the court held that 1931 Act premium payments could be

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[4] Petitioner does not address *Alexander* directly. Instead, petitioner quotes the portion of the majority and dissenting opinions below suggesting that *Alexander* supports petitioner's position. See, *e.g.*, Pet. 4 n.2, 13.

credited toward overtime payments under Section 207(h). *Alexander*, 32 F.3d at 1577.

Alexander, however, nowhere holds that 1931 Act pay for one work period may be credited against FLSA overtime pay for another. As the decision below acknowledged, the court merely stated in passing that "1931 Act pay is creditable toward any overtime compensation due under the FLSA." 32 F.3d at 1577. It is highly doubtful that, by using the phrase "toward any overtime compensation due," the court of appeals meant to rule that premium pay can be credited under an aggregate as opposed to work-period method. To the contrary, the issue was not before the court, since the INS was crediting its 1931 Act premiums against FLSA overtime on a work-period basis. *Alexander* v. *United States*, 28 Fed. Cl. 475, 484 (1993) (explaining how INS calculates overtime on a "per pay period" basis); see 32 F.3d at 1572-1573 (INS "computed their overtime pay under FLSA * * * for all hours worked * * * in excess of 85.5 *per pay period*") (emphasis added);[5] see also pp. 13-14, *infra* (OPM regulations). To the extent the Federal Circuit's decision can be read as passing on the proper methodology, the court approved of the INS's work-period method, holding that the "INS' method of computing overtime pay for inspection work and border patrol duties is proper." 32 F.3d at 1577. Indeed, the Federal Circuit analyzed extra-compensation credits on a work-period basis: "The agency's approach is best understood through an example. Assume that, during a given pay period, an employee

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[5] Since the employees worked in law enforcement, 29 U.S.C. 207(k) provided a relevant work period of 85.5 hours over two weeks, see *Alexander*, 32 F.3d at 1576 n.5, rather than the normal 40-hour workweek. See also note 3, *supra*.

works 80 hours at a basic rate of $12.58 performing border patrol duties." 32 F.3d at 1575.

Against that background, there is no basis for concluding that the isolated phrase "toward any overtime" in the Federal Circuit's *Alexander* opinion must necessarily be read as a *sua sponte* ruling that the FLSA provides for aggregate (rather than work-period) crediting. In any event, even if the phrase could be so construed, any such pronouncement would be dictum that does not bind future panels.[6]

For that reason, petitioner errs in asserting that, "as the law is presently constituted, the Secretary can take advantage of the very [aggregate] credits that she seeks to deny to Fabri-Centers. *See, Alexander* v. *United States*, 32 F.3d 1571, 1577 (Fed. Cir. 1994)." Pet. 21. *Alexander* simply does not authorize (much less compel) the aggregate-crediting methodology that petitioner proposes. Furthermore, Office of Personnel Management (OPM) regulations bar the Secretary (and any other covered federal agency) from crediting premiums from one work period against FLSA overtime for another work period. The applicable regulation states: "An employee entitled to overtime pay under this subpart and [premium] overtime pay under any authority outside of title 5, United States Code, shall be

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[6] The issue before the *Alexander* court, after all, was whether to include 1931 Act pay as premium compensation that could be claimed as a credit under Section 207(h). On that issue, the court sided with the INS, holding that such payments properly fall under Section 207(h): "1931 Act pay constitutes 'extra compensation' * * * and [a]s a result, 1931 Act pay is creditable toward any overtime compensation due under the FLSA." 32 F.3d at 1577. The issue of precisely how the premiums would be applied against FLSA overtime liability was not at issue, much less considered and decided.

paid under whichever authority provides the greater overtime pay entitlement *in the workweek*." 5 C.F.R. 551.513 (emphasis added).[7] Thus, far from a "chaotic situation" (Pet. 21), Section 207(h) is applied uniformly to private and public employers alike.

2. The court of appeals' decision, moreover, is correct. Properly construed, Section 207(h)(2) permits an employer to credit contractual premium compensation against FLSA overtime otherwise due only on a work-period basis—a conclusion amply supported by the Act's text, its history, Department of Labor imple-

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[7] In administering the quoted regulation, covered executive agencies determine the statutory or contractual premium due in a given workweek and then compare that amount to the FLSA overtime payable over that same workweek. If the statutory premium in one week exceeds the FLSA amount payable, the employee receives the higher statutory premium. If the FLSA amount payable exceeds the statutory premium in the next week, the employee must "be paid under [the] authority [that] provides greater overtime pay entitlement in the workweek," *i.e.*, the FLSA amount. 5 C.F.R. 551.513. Thus, like the work-period approach adopted by the court of appeals, OPM regulations do not permit higher statutory premiums paid in one week to be credited against FLSA overtime for later (or earlier) periods. Besides, if there were ambiguity to OPM's regulation, the Department of Labor has clearly expressed its view that "surplus overtime premium payments * * * may not be carried forward or applied retroactively to satisfy an employer's overtime obligation in future or past pay periods." Department of Labor, *Wage-Hour Op. Letter No. 526*, 1985 WL 304329, at *8 (Dec. 23, 1985). In the event of a conflict between OPM and the Secretary of Labor in this area, "OPM is * * * obliged to exercise its administrative authority in a manner consistent with the Secretary of Labor's implementation of the FLSA. * * * When the civil service and FLSA systems conflict, OPM must defer to the FLSA so that any employee entitled to overtime compensation under FLSA receives it under the civil service rules." *AFGE* v. *OPM*, 821 F.2d 761, 770 (D.C. Cir. 1987).

menting regulations and opinion letters, and pertinent case law. Pet. App. 10a-26a.

a. First, the court of appeals' and Secretary's construction is strongly supported by the text and structure of the Act. By its terms, Section 207(h)(2) provides: "Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section." 29 U.S.C. 207(h)(2). While Section 207 does not itself specify the time period for calculating overtime and credits, the remaining provisions of the FLSA make clear that the workweek or work period is the applicable period. The substantive requirement of overtime is so framed: "No employer shall employ any of his employees who *in any workweek* is engaged in commerce * * * *for a workweek* longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. 207(a)(2)(C) (emphases added). Section 207(e)(5)-(7) contemplates that contractual premiums will be paid on a workweek basis: "extra compensation provided by a premium rate *paid for certain hours* * * * *in any* * * * *workweek*." 29 U.S.C. 207(e)(5) (emphasis added). See 29 U.S.C. 207(*l*) ("No employer shall employ any employee in domestic service * * * for a *workweek* longer than forty hours.") (emphasis added); *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572, 579 (1942) ("It is likewise abundantly clear from the words of § 7 that the unit of time under that section within which to distinguish regular

from overtime is the week.").[8] And Department of Labor regulations likewise highlight the primacy of the workweek or work period under the FLSA: "The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends." 29 C.F.R. 778.106; see 29 C.F.R. 778.103-778.105 ("The workweek as the basis for applying section 7(a)"; "Each workweek stands alone"; and "Determining the work-week").

The premium-payment credit provision at issue here, Section 207(h)(2), is most logically read in conjunction with those substantive overtime provisions. Under the statute, contractual premiums may be credited only "toward overtime compensation payable *pursuant to this section.*" 29 U.S.C. 207(h)(2) (emphasis added). Because FLSA overtime is "payable pursuant to" the FLSA on a work-period basis, credits against that overtime are likewise claimable on a work-period basis. In any event, as the court of appeals explained, these interrelated provisions of the FLSA "lend support to the Secretary's position that premium credits allowed by § 207(h)(2) should be limited to the same workweek or work period in which these premiums were paid." Pet. App. 19a.

Second, as the court below noted, the Administrator of the Wage and Hour Division, who enforces the FLSA

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[8] There are notable statutory exceptions to the use of the work-week standard under the FLSA, 29 U.S.C. 207(j)-(k), see notes 3-4, *supra*; note 9, *infra*, but those exceptions similarly deal in work periods. Premium crediting under those provisions occurs only on a *work-period* basis rather than an aggregate basis. See, *e.g.*, *Nolan* v. *City of Chicago*, 125 F. Supp. 2d 324, 331 (N.D. Ill. 2000) ("The Court holds the [premium] offsets should be calculated on a period by period basis.").

under a statutory assignment of authority from Congress, 29 U.S.C. 204, has long held that extra compensation under Section 207(h) may only be credited on a workweek or work-period basis:

> [S]urplus overtime premium payments, which may be credited against overtime pay pursuant to section 7(h) of [the] FLSA, *may not be carried forward or applied retroactively to satisfy an employer's overtime pay obligation in future or past pay periods.*

Department of Labor, *Wage-Hour Op. Letter No. 526*, 1985 WL 304329, at *9 (Dec. 23, 1985) (emphasis added). Wage-Hour Opinion letters from more than three decades ago are in accord. Where the relevant work period is 80 hours, those letters explain, "the extra compensation provided by [a] premium rate for such daily overtime hours may be credited, pursuant to section 7(h) of the Act, toward any overtime compensation payable under section 7(j) for hours worked in excess of 80 *in such period.*" *Opinion Letter No. 537*, [1966-1969 Transfer Binder] Wage-Hour Admin. Rulings (CCH) ¶ 30,524, at 41,922 (Dec. 2, 1966) (emphasis added); *Opinion Letter No. 540*, [1966-1969 Transfer Binder] Wage-Hour Admin. Rulings (CCH) ¶ 30,527, at 41,926 (Dec. 20, 1966) (same).[9] To the extent the statute is ambiguous, this consistent and informed position of the Department of Labor, now well over three decades old, is entitled to deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944).

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[9] Section 7(j), 29 U.S.C. 207(j), is a statutory exception for hospital and related employment and allows for "a work period of fourteen consecutive days."

Third, the court of appeals correctly evaluated the legislative history of Section 207(h). That history suggests that Congress, when it enacted the current crediting provisions in 1949, was aware that the Department of Labor used a work-period standard for calculating overtime. See Pet. App. 14a (citing S. Rep. No. 402, 81st Cong., 1st Sess. 4 (1949)); see also *Roland Elec. Co.* v. *Black*, 163 F.2d 417, 420-421 (4th Cir. 1947) (relying on the "well settled construction that the Act takes as its standard a single workweek," and "the persuasiveness of administrative interpretation," in holding that "payments in excess of the amount required by the statute to an employee for work done in certain weeks do not relieve the employer from the obligation to compensate the employee for deficiencies in other weeks"), cert. denied, 333 U.S. 854 (1948). While the text of Section 207 changed the law to eliminate overtime on overtime, nothing in the text suggests an intent to displace the Labor Department's longstanding view that overtime must be calculated on a work-period basis. "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974)) (footnotes omitted). That principle is of particular force where the legislative history expressly acknowledges the agency's construction.

Petitioner's argument to the contrary, which rests on a short-lived version of the credit provision (Pet. 18-19), is misplaced. The original version of the credit provision enacted in 1949 read: "[E]xtra compensation pro-

vided by such premium rate shall not be deemed part of the regular rate at which the employee is employed and may be credited toward *any* premium compensation due him under this section for overtime work." Act of July 20, 1949, ch. 352, 63 Stat. 446 (emphasis added). As the court of appeals noted, however, later that same year Congress amended the FLSA and, among other changes, deleted the word "any" from the provision. The court below was correct to find that the deletion undermined petitioner's argument. Even if one could assume that the original premium-crediting provision possessed the meaning petitioner proposes by virtue of the "toward *any* premium" language—a dubious proposition from the outset—that meaning was surely altered when Congress excised the word "any."

Contrary to petitioner's claim (Pet. 19-20), the inference arising from that change is not a peculiar California-specific convention. To the contrary, it is widely employed. See, *e.g.*, 1A Norman J. Singer, *Sutherland Statutory Construction* § 22:29, at 264 (5th ed. 1993) ("When the statute is amended and words are omitted, the general rule of construction is to presume that the legislature intended the statute to have a different meaning than it had before the amendment."); see also *Stone* v. *INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."); *In re Bennett*, 338 F.2d 479, 484-485 (6th Cir. 1964) (applying "rule of statutory construction that an amendment to an existing statute is indicative of a legislative intent to change existing law"). In any event, there is no basis for petitioner's contention that "Congress made it clear that it intended no change

whatsoever to its earlier enacted crediting proviso." Pet. 19.[10]

Fourth, petitioner's interpretation of Section 207(h) could result in serious abuses, introduces significant anomalies, and belies common sense. Under the FLSA, an employer cannot average the number of hours worked over several weeks (much less two years) to avoid paying overtime. 29 C.F.R. 778.104 (giving example of 30 hours in one week and 50 hours in the next). For the same reason, an employer who pays above the statutory overtime requirement in one week pursuant to a contract (*e.g.*, double time for Sunday or holiday overtime) cannot pay less than the statutory requirement for overtime work in the next week. Under petitioner's theory, however, an employer could accomplish the same result by unlawfully withholding FLSA overtime payments earned by employees for an extended period of time—months or even years—and then seeking to offset against the FLSA overtime liability any contractual premiums paid during that extended period. Cf. Pet. App. 23a ("Were [petitioner's reading correct], then an employer who paid twice the minimum wage in one week would not owe anything the following week for the same number of hours worked."). Such a delay violates Section 207(a)(1)'s mandate that em-

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[10] The legislative history petitioner cites on the crediting issue (Pet. 19) is ambiguous at best. Moreover, petitioner never answers the contrary legislative history found in S. Rep. No. 402, 81st Cong., 1st Sess. 4 (1949). That report makes references to paragraphs 13, 69, and 70 of the Wage and Hour Interpretive Bulletin No. 4, which explicitly uses the workweek as the basis for its overtime computations. Yet the report nowhere suggests that Congress intended to eliminate the workweek as the fundamental unit for measuring both overtime payments and credits against such payments. See p. 18, *supra*.

ployers promptly pay overtime compensation and the establishment of the work period as the fundamental unit for pay calculation purposes. See 29 C.F.R. 778.106 ("The general rule is that overtime compensation earned in a particular workweek must be paid on the regular day for the period in which such workweek ends."); *Biggs* v. *Wilson*, 1 F.3d 1537, 1539, 1544 (9th Cir. 1993) (deeming unworkable any distinction between "late payment and nonpayment," and finding a delay of 14 days in the payment of wages owed under the statute to be a violation of the FLSA), cert. denied, 510 U.S. 1081 (1994).

For those very reasons, the only other court of appeals to have squarely considered this issue rejected the argument petitioner raises here. "Courts have long interpreted the FLSA as requiring that [FLSA overtime] payments be timely made. * * * Thus, the statute is violated even if the employer eventually pays the overtime amount that was due. * * * [Allowing premium payments to be carried forward or backwards to offset FLSA liability] would eviscerate the protection intended by the overtime payment requirement." *Howard*, 274 F.3d at 1148-1149. *Howard* thus ultimately reached the same conclusion as the court below: "premium pay credits should only offset overtime liabilities that accrued in the same time period." *Id.* at 1147.[11]

b. To support its contrary construction, petitioner relies principally on the verb tenses used in Section 207(h). Those tenses, petitioner asserts, necessarily allow employers to carry premium payments forward

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[11] The Seventh Circuit also correctly identified *Abbey*, *supra*, which has now been overruled, see note 2, *supra*, as the only contrary precedent on point. *Howard*, 274 F.3d at 1147-1148.

(or backward) indefinitely as a credit against FLSA overtime owed:

> If * * * extra compensation crediting can only occur within a workweek, and then only to the extent such crediting is equal to or lesser than that particular workweek's FLSA overtime compensation, Congress would have instead used a uniform past tense throughout the statute: "Extra compensation paid * * * shall be credited toward overtime compensation paid [as opposed to 'payable,' as the statute states]."

Pet. 17-18.

The court of appeals properly rejected that argument. For one thing, petitioner's proposed formulation —"extra compensation paid shall be credited toward overtime compensation paid"—is linguistically difficult, since it suggests providing a credit against an amount that has already been paid. Ordinarily, credits are provided against an amount that otherwise *should* or *must* be paid, not amounts already paid.

Further, contrary to petitioner's assumption, the term "payable" is not properly construed to mean an amount that will or may *become* payable at some other, future date. Instead, "payable" is typically understood to mean *currently* owed or due. Pet. App. 16a. "[W]hen used without qualification, the term [payable] normally means that the debt is payable at once, as opposed to 'owing.'" *Ibid.* (quoting *Black's Law Dictionary* 1128 (6th ed. 1990)) (emphasis omitted). Petitioner's argument based on verb tenses thus rests on the false assumption that the word "payable" connotes payments that will be owed or due in the future, after some other contingency occurs, rather than sums presently due under the FLSA for work performed.

Pet. App. 16a-17a. Petitioner's verb tense argument also ignores the fact that the statute refers to FLSA overtime "payable pursuant to this section." Because such overtime is "payable" on a work-period by work-period basis, the crediting occurs on that basis as well.

Petitioner's bare assertion (Pet. 10, 14) that the court of appeals' decision conflicts with *Christensen* v. *Harris County*, 529 U.S. 576 (2000), is likewise unpersuasive. *Christensen* addressed whether "the FLSA * * * prohibits a State or subdivision thereof from compelling employees to utilize accrued compensatory time." 529 U.S. at 582. The use of compensatory time is not at issue here. Nonetheless, citing only the penultimate sentence of *Christensen*—and none of the Court's other reasoning—petitioner apparently reads *Christensen* as resting solely on the absence of an express prohibition in the FLSA. See Pet. 14 (citing *Christensen*, 529 U.S. at 588).[12] The Court's opinion, however, carefully analyzed the text and structure of the Act to determine whether "the FLSA *implicitly* prohibits" the practice at issue, even after finding no *express* prohibition. 529 U.S. at 582 (emphasis added). The Court, moreover, declined to follow the Department of Labor's view (expressed in opinion letters) that the FLSA prohibited the practice, *id.* at 587, only after concluding that the Department's construction "would make little sense," *id.* at 586. Here, petitioner's methodology is implicitly or explicitly barred by the FLSA, and the Department of Labor's construction is eminently sensible.

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[12] In this case, moreover, petitioner did violate an express prohibition by withholding, for years on end, statutory overtime earned by its employees. The only question is how one calculates the obligation resulting from that breach.

It is, by contrast, petitioner's interpretation that "would make little sense." At bottom, petitioner's construction appears to rest on the implausible premise that Congress intended there to be *no* temporal limit on the ability of employers to carry extra pay forward or backward as a credit against FLSA overtime In petitioner's view, employers may effectively establish "running tabs" of FLSA liabilities and credits—offsetting premium payments and FLSA liabilities separated by years—subject to final settlement only when the employee leaves or sues.[13] The far more sensible view is that Congress expected FLSA obligations and premium pay credits to be offset on a work-period basis, which is how they accrue. Petitioner offers no persuasive evidence that Congress intended the contrary, counter-intuitive, result.

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[13] Indeed, petitioner's theory is hard to reconcile with the FLSA's ordinary two-year statute of limitations, which begins running at each regular pay day following the work period in which the overtime was not paid. 29 U.S.C. 255. Petitioner's theory suggests that an employee either could not file suit immediately following the failure to pay, because the employer might in the future claim a credit for extra premium compensation, or the employee would be able to sue immediately, but his damages might disappear upon the employer's payment of creditable extra compensation at a later date. Neither result makes sense. Instead, the violation occurs when the underpayment occurs, and credit can be claimed only for extra compensation paid for work done in the same period in which the FLSA liability accrues.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2003